JONAS NINGEOK

IBLA 88-17 Decided June 23, 1989

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying petition for reinstatement of Native allotment application F-16643.

Affirmed as modified.

1. Administrative Procedure: Generally--Administrative Procedure: Hearings--Alaska: Native Allotments--Applications and Entries: Relinquishment

   Generally, BLM has the duty to examine whether a relinquishment of a Native allotment application was knowing and voluntary when the applicant declares it was not. However, where the evidence submitted by the applicant clearly shows, as a matter of law, the invalidity of the claim, it is unnecessary to conduct a factual investigation of the circumstances of the relinquishment.

2. Alaska: Native Allotments

   In order for a Native allotment applicant to gain a vested right to an allotment, the applicant must show 5 years' use and occupancy of the land and the filing of an application therefor. Where a Native uses and occupies land but does not file a Native allotment application for such land and thereafter ceases use and occupancy of the land for more than 20 years, dur-ing which time the Federal Government withdraws the land from appropriation under the public land laws, including the Native Allotment Act, a Native allotment application subsequently filed for the land must be rejected.

3. Administrative Procedure: Generally--Administrative Procedure: Hearings--Alaska: Native Allotments

   Where a Native allotment applicant asserts entitlement to a hearing in order to establish when use and occupancy of the claimed land commenced, no hearing is necessary where, accepting as true the applicant's allegations regarding his use and occupancy, appli-
   cant is not entitled, as a matter of law, to a Native allotment.

APPEARANCES: Kimberly Hueter, Esq., Alaska Legal Services Corporation, Barrow, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Jonas Ningeok has appealed a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 25, 1987, denying his petition for reinstatement of Native allotment application F-16643. The application was originally filed on March 24, 1972, pursuant to the Native Allotment Act of May 17, 1906, 43 U.S.C. || 270-1 through 270-3 (1970). 1/ Therein, Ningeok claimed use and occupancy of land commencing in June 1956 for hunting and fishing. He designated the land as parcel A and described it as the SW^ SE^ of sec. 33, T. 9 N., R. 34 E., Umiat Meridian.

By notice dated March 1, 1974, BLM informed Ningeok that his application was subject to rejection unless he submitted additional evidence of use and occupancy within 30 days of receipt of the notice. BLM explained that its records showed that the claimed land was entirely within the Arctic National Wildlife Refuge and had been withdrawn from appropriation under the public land laws, including the Native Allotment Act of May 17, 1906, since February 3, 1943, by Public Land Order No. 82, by Public Land Order No. 2214 of December 6, 1960, or by the creation of the Arctic National Wildlife Refuge, 16 U.S.C. § 668dd note (1982). Thus, BLM afforded Ningeok the opportunity to establish that his use and occupancy predated the withdrawal of the land.

On March 15, 1974, BLM received a document dated January 30, 1974, and signed by Ningeok, wherein he relinquished his application, stating that he was doing so "[a]fter consulting with the Kaktovit Inupiat Board of Directors." There is no indication that the relinquishment was approved by the Bureau of Indian Affairs.

By notice dated April 9, 1974, BLM granted various Native allotment applicants, including Ningeok, 30-day extensions to submit additional evidence in support of their claims, pursuant to a request by counsel. The notice added, "[S]everal applicants have relinquished a part of or all of their Native Allotment Claim. This is noted as such on the attached list." That list indicates that Ningeok's claim had been relinquished and his case

1/ Pursuant to the Native Allotment Act of May 17, 1906, the Secretary of the Interior is authorized to convey up to 160 acres to qualified individuals, provided that, "No allotment shall be made to any person under section 270-1 to 270-3 of this title until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C | 270-3 (1970). Although the Native Allotment Act of May 17, 1906, was repealed as of Dec. 18, 1971, by the Alaska Native Claims Settlement Act, applications which were pending on that date may be granted if eligible. 43 U.S.C. | 1617(a) (1982). Although Ningeok's application was not filed with BLM until March 1972, it was dated Nov. 22, 1970, and no challenge to its timeliness has been raised. See Heirs of Linda Anelon, 101 IBLA 333 (1988).

closed by BLM on March 19, 1974. The record reveals no response by Ningeok to BLM's April 1974 notice.

On January 14, 1977, the land which had been described in Ningeok's Native allotment application was conveyed to the Kaktovik Inupiat Corporation, by patent No. 50-77-0046.

On March 3, 1981, BLM received a document, dated January 30, 1981, signed by Ningeok, as well as by a translator, and a notary public. Therein, Ningeok declared, "I am told that I signed a paper a few years
ago in which I gave up my native allotment. I did not know that I was signing anything like that. I want very much to continue my native allotment application * * *." The document was accompanied by a cover letter requesting reinstatement of Ningeok's allotment application. On April 20, 1982, BLM reopened the case file for allotment application F-16643.

Thereafter, on February 27, 1987, Ningeok filed a sworn affidavit with BLM wherein he stated that he was born in 1917, although the "official date is 1922. That is because when I went to work for Arctic Constructors in Barrow, in about 1946, they put down the wrong age for me. I am still trying to get this straightened out" (Affidavit at 1). Ningeok stated that he was born on Barter Island, across the lagoon from the claimed land, and that he presently lives on the island. He explained that the mainland site is better for hunting ducks and caribou than Barter Island, and that he first hunted and fished at the site about 60 years ago. He continues:

> 6. My father was head of the family and he moved us to Barrow in about 1933. By that time I was able to live on my own and I worked as a reindeer herder for more than 10 years, then I worked construction and finally moved back to Barter Island in the middle 1950's. One of the first things I did was go hunting at my dad's campsite. I eventually put up a wooden tent floor there, along with drying racks and other things. The things we left there when we moved to Barrow are mostly gone now, because the area is right on the water and there are often serious storms.

(Affidavit at 2).

By decision dated August 25, 1987, BLM stated that even assuming his relinquishment was involuntary and unknowing, Ningeok's petition for reinstatement had to be denied. BLM based its conclusion on its finding that the claimed land was withdrawn pursuant to Public Land Order No. 82 at the time of Ningeok's alleged use and occupancy. Thus, BLM appeared to discount any use by Ningeok prior to 1933 and conclude that his use and occupancy commenced in 1956, after withdrawal of the land. Ningeok timely appealed that decision to this Board.

In his statement of reasons (SOR) appellant argues that his use and occupancy of the claimed land meets the requirements for an allotment, and that he is entitled to a hearing to determine both when his occupancy began and whether his relinquishment was knowing and voluntary. Appellant also contends that BLM's decision was premature as it had not conducted a field

examination of the claimed site or provided appellant with notice of its intent to deny his petition for reinstatement and an opportunity to submit further evidence.

The questions presented by this case are whether appellant's relinquishment was knowing and willful and if it was not, whether appellant has satisfied the requirements for a Native allotment. Since the land in question has been conveyed out of Federal ownership, the Department has no jurisdiction to adjudicate Native allotment applications as interests in the land conveyed. See Heirs of Linda Anelon, 101 IBLA at 336; City of Klawock, 94 IBLA 107, 111-12 (1986). However, it does have a fiduciary duty to Alaskan Natives under the Act of May 17, 1906, to determine the validity of Native allotment applications and to pursue recovery of the land through negotiation or litigation in the case of valid applications. Elizabeth G. Cook, 90 IBLA 152, 156-57 (1985); State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984). In this case there is no need
to pursue recovery of the land, because appellant is clearly not entitled to an allotment, and no hearing is necessary before reaching that result. The rationale for our conclusion, however, differs from that of BLM, as set forth in its August 1987 decision.

[1] We have held that where a Native requests reinstatement of a relinquished Native allotment application, the Department has a duty to reexamine the circumstances of the relinquishment to determine whether it was knowing and voluntary. Heirs of William A. Lisbourne, 97 IBLA 342 (1987); Matilda Titus, 92 IBLA 340 (1986). However, the purpose of investigating the circumstances of the relinquishment is ultimately to pursue recovery of the land if the allotment claim is valid. Matilda Titus, supra at 347. In this case, there is no point in reexamining the circumstances
of the relinquishment to determine whether it was knowing and voluntary, because it is clear that the allotment claim itself is invalid as a matter of law. Consequently, we find that where an applicant's allegations clearly show, as a matter of law, the invalidity of the Native allotment claim, it is unnecessary to conduct a factual investigation to determine if a relinquishment was knowing and voluntary. For purposes of disposition of this case, we may assume that appellant's relinquishment was involuntary and unknowing.

[2] However, even accepting all the facts alleged by appellant as true, he has failed to establish his right to the claimed land. Appellant states that he began using the land, along with other members of his family, as a campsite for hunting and fishing about 60 years ago, well in advance of the 1943 withdrawal, which was made when he was about 26 years old. Nevertheless, as set forth above, in 1933 appellant relocated to Barrow and did not move back to Barter Island until the middle 1950's. Apparently, this is the reason that appellant originally stated in his allotment application that his occupancy of the land commenced in 1956. Appellant now evidently believes that his use and occupancy prior to the withdrawal is sufficent to establish his right to a Native allotment. It is not, for the following reasons.

Assuming, without deciding, that appellant's use of the land prior to 1933 with other members of his family was qualifying use and occupancy, 2/ he never established a vested right to a Native allotment. In United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981), the Board explained that the right to a Native allotment vests only where the Native completes the requisite 5 years' use and occupancy and files an application therefor. We stated:

> [I]t was only by application, together with the requisite use or occupancy, that the inchoate preference right matured into a vested right. The preference right was not an in praesenti grant of land. On the contrary, it required clear identification of the land sought by an applicant before it could be exercised. Indeed, the system of allotment could proceed on no other basis. A Native could clearly use or occupy in excess of 160 acres in a manner consonant with the Native Allotment Act. Prior to his or her application, the Native's use and occupancy would be protected against outside encroachments, save for that by the United States. By application, however, the Native would receive a preference right to an allotment of up to 160 acres. [Emphasis in original; footnote omitted.]

Id. at 234, 88 I.D. at 387.

Therefore, appellant's use and occupancy of the land in question prior to his relocation to Barrow in 1933 did not gain him any rights as against the United States, since he had not filed an allotment application. His cessation of use and occupancy of the land continued until his return to Barter Island in the middle 1950's. At that time the land had been withdrawn by Public Land Order No. 82 and, thus, was unavailable for the initiation of Native allotments. See Heirs of Doreen Itta, 97 IBLA 261, 266 (1987). Moreover, the land has continued to be unavailable based on subsequent executive and legislative action. The fact that appellant may have had the subjective intent at all times to return to the land and, in fact, did return in the middle 1950's did not prevent the 1943 withdrawal from attaching to the land.

[3] Appellant claims that he is entitled to a hearing to determine when his use and occupancy began. In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Ninth Circuit Court of Appeals held Native allotment applicants are entitled to notice and a hearing before their applications are rejected. However, if an applicant does not allege

---

2/ Appellant directs our attention to a decision of the United States District Court for the District of Alaska, George v. Hodel, No. A86-113 (D. Alaska, Apr. 30, 1987), in which the court held that the Department of the Interior's interpretation that an allotment applicant's use and occupancy must be independent and exclusive of immediate family members was unreasonable and inconsistent with the Native Allotment Act and its implementing regulations.

facts which, if true, would create entitlement to an allotment, the application may be rejected without a hearing. Agnes Mayo Moore, 91 IBLA 343 (1986). As the facts, as set forth by appellant, show the invalidity of
his claim, as discussed above, a hearing is not required. 3/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appealed decision is affirmed as modified.

Bruce R. Harris
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

3/ For the same reasons, a field examination of the claim is not required.